FOLIN & BROTHERS SDN. BHD. (IN RECEIVERSHIP)

v.

WONG FOH LING & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[SUIT NO. D4-23-684-87]
9 NOVEMBER 1990

CIVIL PROCEDURE: *Statement of affairs by director - Whether is admission of loan by company to director - Interpretation of "or otherwise" - Same parties, different actions - Different issues - Whether admission of fact - Rules of the High Court 1980, O. 27.*

The first defendant D1 is a director of the plaintiff company P. Upon P going into receivership, D1, in accordance with the provisions of the Companies Act, 1965 (the Act), rendered P a statement of affairs. In the statement of affairs it is shown that against the name of D1 a sum was stated as "amount owing" and the same amount was also stated as "amount realisable".

Based on the statement of affairs, P filed an application to enter final judgment against D under O. 27 r. 3 of Rules of the High Court 1980 (RHC) for debt due and owing.

D1 submits that as a director of P, D1 was obliged to give a statement of affairs pursuant to ss. 188 and 189 of the Act to the receivers and this should not be construed as admission of a loan from P to D1. Therefore D1 contended that P cannot rely on the statement of affairs to obtain final judgment under O. 27 r. 3 RHC.

P confirmed that at the time the statement of affairs was made, P was under receivership but subsequently was wound-up by a Court order. A debenture was signed between P and SCB banking facilities.

The Senior Assistant Registrar granted P judgment; D1 appeals.

Held:

[1] Under O. 27 RHC, admissions may be made in the pleadings or otherwise; the words "or otherwise" including on admission made by letter stating facts which show the defendant has no defence to the action.

[2] Admissions must be made by a party to the same cause or matter and an admission contained in a statement of defence in one action could not properly be treated as conclusive in other proceedings between the same parties but on a different issue.

[3] (a) The statement of affairs was made pursuant to the requirement of the receivers; it was not an admission made in the cause or matter as the parties there were different and the issues raised were different from the issue in the present case.

(b) The statement of affairs was prepared as a result of the debenture and debt due and owing by P to the bank; in the present case, the issue is whether there is a debt due and owing by the defendant to P.

(c) therefore the statement of affairs was not an admission in the same cause or matter.

[Appeal allowed.]

Cases referred to:
Ellis v. Allen [1914] 1 Ch 905
British Thomson-Houston Company Ltd. v. British Insulated and Helsby Cables Ltd. [1924] 2 Ch 160
Re Walters [1889] 61 LT 872

Legislation referred to:
Companies Act 1965, ss. 188, 188(3), 189
Rules of the High Court 1980, O. 27 r. 3

Other sources referred to:
Company Law, 1988 Walter Woon, p. 364

For the Respondent/plaintiff - K.L. Low; M/s. Arifin & Partners
For the First defendant/applicant - Krishnan Iyer; M/s. Majid, Krishnan, Menon & Lee

JUDGMENT

Zakaria Yatim J:

This is an appeal by the first defendant against the decision of the Senior Assistant Registrar granting the plaintiff judgment pursuant to O. 27 r. 3 of the Rules of the High Court 1980.

According to the statement of claim, the plaintiff, a company incorporated in Malaysia having its place of business at Lot 18, Jalan 223, Petaling Jaya, is in receivership and acting through and by its receivers and managers, Geh Cheng Hooi and Ramli Ibrahim. The first, second and third defendants are directors of the plaintiff company.

Upon the plaintiff going into receivership, the first defendant, in accordance with the provisions of the Companies Act 1965, as a director of the plaintiff rendered to the plaintiff a statement of affairs in regard to the affairs of the plaintiff. In item 92 of schedule B to the statement of affairs it is shown that against the name of the first defendant a sum of RM62,863.20 under the column "amount owing" and the same amount under the column "amount realisable". It is on the basis of the statement of affairs and the affidavit verifying the statement of affairs, that the plaintiff filed the application to enter final judgment against the first defendant under O. 27 r. 3.

Mr. Krishnan Iyar, Counsel for the first defendant submitted that the statement of affairs given to a receiver which a director is obliged to make under the Companies Act should not be construed as admission of a loan from the plaintiff to the first defendant.

It is now necessary to examine O. 27 r. 3. Rule 3 states:

> 3. Where admissions of fact are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the Court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties, and the Court may give such judgment, or make such order, on the application as it thinks just. An application for an order under this rule may be made by summons.

Under the rule, the admission may be made in the pleadings or otherwise. The words "or otherwise" include an admission made by letter stating facts which show that the defendant has no defence to the action, *Ellis v. Allen* [1914] 1 Ch 905. It is significant to note that the admission must be made by a party to the same cause or matter. It has been decided in *Re Walters* [1889] 61 LT 872, that an admission contained in a statement of defence in one action could not properly be treated as conclusive in other proceedings between the same parties but on a different issue. In *British Thomson-Houston Company Limited v. British Insulated and Helsby Cables, Limited* [1924] 2 Ch 160, the English Court of Appeal decided as follows:

> Oral testimony, called in judicial proceedings to prove a certain contention, is not such an admission by conduct of the truth of that contention as to be admissible, in other proceedings, as evidence against the party who tendered the testimony. The fact that the evidence is used and relied upon in the Court of Appeal and printed in the case on appeal to the House of Lords does not make it any more admissible in other proceedings as against the party who tendered it in the Court of first instance.

In the present case the plaintiff's claim is for debt due and owing. The statement of defence denies the claim. On the basis of the authorities cited above, the plaintiff, in this action, cannot rely on the statement of affairs to obtain final judgment under O. 27 r. 3. The statement of affairs was made pursuant to ss. 188 and 189 of the Companies Act. It is not clear what is the legal position with regard to the plaintiff. In the statement of claim it is stated that the plaintiff company is in receivership.

In the affidavit in support of the application for final judgment it is stated that the company is in liquidation. A company in receivership is different from a company in liquidation. See Walter Woon, *Company Law*, 1988, p. 364.

It would appear that since the statement of affairs was made pursuant to ss. 188 and 189 of the Companies Act, the plaintiff must have been wound up. Section 188(3) of the Companies Act states:

> Where a company is being wound up, this section and s. 189 shall apply notwithstanding that the receiver or manager and the liquidator are the same person.

Counsel for the plaintiff confirmed that the plaintiff was subsequently wound-up by the order of the Court. He submitted however, that at the time the statement of affairs was made, the plaintiff was only under receivership and the receivers and managers were appointed pursuant to a debenture. The debenture was signed between the plaintiff and the Standard Chartered Bank for the purpose of obtaining banking facilities from the bank.

Therefore since the statement of affairs was made pursuant to the requirement of the receivers, the parties involved were the bank and the plaintiff. The issues between the parties were the debenture and banking facilities granted by the bank to the plaintiff.

In the circumstances the statement of affairs was not an admission made in the same cause or matter. The parties were different and the issues raised under the debenture were entirely different from the issue in the present case. The statement of affairs was prepared as a result of the debenture and debt due and owing by the plaintiff to the bank. In the present case, however the issue is whether there is debt due and owing by the defendant to the plaintiff.

For the reasons stated above, the plaintiff is not entitled to final judgment in this case. The appeal is therefore allowed with costs.

Also found at [1991] 1 CLJ 743